the class is created by the Federal Government. The practical effect of both classes of statutes is to bar the ineligible alien, for one who cannot become a citizen is unable to make a *bona fide* declaration of intention to become one.

It is unfortunate that only a few nations are affected by this legislation. The increasing number of these laws, and the feeling which they represent, make it doubtful whether the Federal Government would conclude a treaty contrary to them. The remedy lies in a clearer diplomatic understanding between the parties interested.[29]

PROPERTY IN INTOXICANTS

Judging by contemporary periodicals, liquor could not be a more fruitful source of discord if the apples of Paris themselves had been pressed into service to make our supply. The question of "property rights" in liquor, as it arises under the prohibition statutes, state and national, is well settled however, in one aspect, and strangely enough, in favor of the unlawful holder. Such a holder may take what dry comfort he can from the fact that if someone steals the liquor from him, that taker is a thief, and will be punished as such.[1]

At first glance, this conclusion does not seem at all startling. It is accepted that the wrongful taker of property should be punished for larceny. But here, plainly enough, is our question. Is liquor property?

There are three types of cases in which this question arises. One is where the state, which has confiscated the liquor, is one party and the holder of the liquor is the other. A second is where the holder himself sues some third person in a civil action of contract or tort, involving the liquor. The third case is where the state is again a party, but in a criminal action against some third person who has taken the liquor from the holder. In the first class of cases, long before the Volstead Act's[2] last word on the subject, courts had held that it is well within the police power to deprive the owner of rights of property in things deemed noxious to public health and morals by state seizure and confiscation.[3]

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[29] For a presentation of the economic problem in California, see the report of the California State Board of Control, *California and the Oriental* (1920).

[1] *Arner v. State* (1921, Okla.) 197 Pac. 710.

[2] Act of Oct. 28, 1919 (41 Stat. at L. 305).

[3] See *Mugler v. United States* (1887) 123 U. S. 623, 665, 8 Sup. Ct. 273, 299 (liquor); *Mullen v. Mosely* (1907) 13 Iowa, 457, 90 Pac. 986, 12 L. R. A. (N. S.) 394, note (gambling implements)." . . . . the right to hold intoxicating liquors *for personal use* is not one of those fundamental privileges of a citizen of the United States." *Crane v. Campbell* (1917) 245 U. S. 304, 308, 38 Sup. Ct. 98, 99.

Courts and legislatures have said harsh things about liquor,—anything from the usual "No property rights of any kind whatsoever shall exist in said prohibited liquors" (Okla. Rev. Laws, 1910, sec. 3620), to "Along with outlaws and alien enemies, they have been debarred of all judicial standing from most ancient times." *Robertson v. Porter* (1907) 1 Ga. App. 223, 231, 57 S. E. 993, 996.

The question has always been whether this principle extended to the relationships of the owner with all persons other than those representing the state. This has resulted in a decided difference of opinion in the second group of cases. These are generally of two kinds: in contract, where the consignor or consignee as owner sues some third person (a carrier) for non-delivery of the liquor;[4] in tort, where one claiming to be the owner sues in conversion some third party who has attached the plaintiff's liquor as another's property, on a judgment against that other.[5] The courts that permit the plaintiff to recover by virtue of his property in the liquor justify their stand by saying that the statutory provisions referred to[6] were never meant to make the goods "free booty" for the rest of the world.[7] Other courts, in square conflict on the same facts and under similar statutes, have said that the plain intent of the legislatures was to "kill" the liquor traffic,[8] and the legislatures seem to have decided that one of the ways to do so is to destroy "property rights of any kind whatsoever in liquor."[9] The plain legislative intent should therefore be effectuated,[10] even if in order to do so it is necessary to cut off all claims arising from ownership against third persons as well as against the state. If one can find a majority tendency in such a chaos of conflicting decisions, it seems to be toward the latter view.[11]

Under such circumstances there does not seem to be much "property" left to the "owner" in his illegally held liquor. He has not enough to keep the state from taking it from him,[12] nor enough to get it back or

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[4] *Norfolk Ry. v. Dehart Co.* (1920) 127 Va. 415, 103 S. E. 594; *Miller v. Chicago Ry.* (1913) 153 Wis. 431, 141 N. W. 263, 45 L. R. A. (N. S.) 334, note (gambling machine).

Contracts for the *sale* of liquor, whether by mortgage or otherwise, generally give neither vendor nor vendee rights of action against each other by the express terms of most state prohibition laws. Conn. Rev. Sts. 1875, ch. 14, sec. 2. *Korman v. Henry* (1884) 32 Kan. 49, 3 Pac. 764. The same result was reached "even in the absence of a statute forbidding recovery, or destroying property rights in the goods sought." *Jackson v. City of Columbia* (1920, Mo.) 217 S. W. 869, 871.

[5] *Monty v. Arneson* (1868) 25 Iowa, 383.

[6] *Supra* note 3.

[7] *Barron v. Arnold* (1890) 16 R. I. 22. There is an intimation in these conversion actions that such an attachment by the defendant is a sort of larceny by legal process, and should not be permitted any more than is any other larceny. *Monty v. Arneson, supra* note 5, at p. 387.

[8] *Donohue v. Maloney* (1881) 49 Conn. 163; *Stajcar v. Dickinson* (1918) 185 Iowa, 49, 169 N. W. 756.

[9] *Supra* note 3; Ga. Extra Sess. Laws, 1915, part I, tit. 2, *Intoxicating Liquors*, sec. 20.

[10] *Donohue v. Maloney, supra* note 8.

[11] See strong dissent, *Monty v. Arneson, supra* note 5 at p. 389.

[12] Consistently enough, where the owner has no property rights against the state, the state does not exact from him the duties generally due it in respect to property. It is on this ground that we can explain the holding that the smuggler of contraband opium which has been confiscated, should not be com-

recover its value from anyone else who takes it from him under legal process or otherwise; but he has enough for the purposes of the state, so that the latter can punish such third person who takes without legal process for the technical crime of larceny.[13] This seems especially inconsistent when the early common law allowed no conviction for the larceny of any object in which there was no property,[14] as for example, dogs and monkeys, because of their baseness. And surely liquor, in the eyes of the law to-day, is sufficiently "base." The directness of the analogy, however, is somewhat lost when it is noted that the reason for holding that such taking was not a felony was based, not on careful distinctions of property and possession, but on the belief that "dogs, cats, bears, foxes, monkeys, ferrets and the like . . . . shall never be so highly regarded by the law, that for their sakes a man shall die."[15] Obviously, a pure question of policy. And so, fundamentally, public policy is the *ratio decidendi* in the leading case of *Commonwealth v. O'Rourke*,[16] which, some seventy years ago, laid down the universally accepted rule that wrongful taking from one who in the eyes of the law, himself has neither legal property nor possession, is still theft.[17]

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pelled to pay an additional penalty laid on "goods, wares, and chattels," which are not declared, since the "outlaw drug" could not be intended by the legislature to be included in the term "goods, wares, and chattels" of merchandise. *United States v. Sischo* (1919, W. D. Wash.) 262 Fed. 1001. See also *United States v. One Ford Automobile* (1919, N. D. N. Y.) 257 Fed. 894. The government may, of course, expressly reserve the power to tax property illegally held. *United States v. Boze Yuginovich* (1921) 41 Sup. Ct. 551.

[13] "No larceny can be committed unless there be some property in the thing taken." 4 Blackstone, *Commentaries*, **235, ". . . . a felonious taking must be of the possession." 3 Coke, *Institutes*, 110.

[14] 2 Blackstone, *op. cit.* *394; 4 *ibid.* *234, 3 Coke, *op. cit.* 109.

See also 4 Blackstone, *op. cit.* *235, "Larceny also could not at common law be committed of treasure trove or wreck till seized. . . . . for till such seizure no one hath a determinate *property* therein." 4 *ibid.* **235, ". . . . stealing the corpse itself, which has no *owner* (though a matter of grave indecency) is no felony . . . ."

[15] 3 Burns, *The Justice of the Peace* (22d ed. 1814) tit. *Larceny*, 245. See also 3 Coke, *op. cit.* 109, "and therefore no person shall *die* for them."

[16] (1852) 64 Mass. 397, 401 per Cushing, J.: "Of the alternative moral and social evils, which is the greater,—to deprive property unlawfully acquired of all protection as such, and thus to discourage unlawful acquisition, but encourage larceny; or to punish, and so discourage larceny, though at the possible risk of thus omitting . . . . to discourage unlawful acquisition? The balance of public policy, if we thus attempt to estimate the relative weight of alternative evils, requires, it seems to us, that the larceny should be punished. Each violation of the law is to be dealt with by itself. The felonious taking has its appropriate and specific punishment; so also has the unlawful acquisition."

[17] *Spalding v. Preston* (1848) 21 Vt. 1 (German silver to be milled into counterfeit dollars); *Bales v. State* (1868) 3 W. Va. 685 (poker chips); *Osborne v. State* (1906) 115 Tenn. 717, 92 S. W. 853 (pistol); *Smith v. Indiana* (1918) 187 Ind. 253, 118 N. E. 954, L. R. A. 1918 D, 690, note (punchboard); *Thomas v. State* (1917) 130 Okla. Cr. 414, 164 Pac. 995 (murder and robbery for liquor);

There can be little question that however clear the cases are on the policy of punishing such crimes, there is an unscientific vagueness in whatever analysis they may make of the legal concept of property. To say that "the law punishes the larceny of property . . . . because of its (property's) own inherent legal rights as property"[18] is altogether begging the question. Property, in the sense of physical objects, has no "rights,"—owners have a "*property*" in those objects which gives them rights against other people.[19] Where the law has condemned certain physical objects as practically "deodands"[20] in which those, previously owners, can now have no rights of property either against the state or others, to be compelled to consider the offence one against "the inherent legal rights" of the object itself, is an admission that the owner himself no longer has any legal property which the taker can invade. The holder has no rights which can be violated; it is ridiculous to say that the object has any,—the breach of duty can only be against the state. Either there is an infinitesimal amount of property left in the possessor of the object, so small that the state can see it, or else the state is in fact punishing merely a manifested criminal intent in cases where no property right was invaded.

It may be suggested that the National Prohibition Act[21] will afford a new basis for departure from the theory of conviction under state statutes. None of the state prohibition acts, under which these convictions have been upheld, has specifically made the possession itself a crime.[22] By general interpretation, it is only possession with intent to sell that is unlawful.[23] It might well be said, then, that it is the *intent* to violate the law that is being penalized, and not the possession itself. By section three of chapter two of the Volstead Act, however, the possession itself is outlawed and expressly made a crime.[24] It might, then, more logically be argued that here the thief could not possibly violate the holder's right of possession, and therefore could not be guilty of larceny. But by construction with section thirty-three of the same chapter, it is plain that it is the possession of liquor

State v. Donovan (1919) 108 Wash. 276, 183 Pac. 127 (liquor). See also 11 A. L. R. 1032, note.

[18] *Commonwealth v. O'Rourke, supra* note 16 at p. 399.

[19] Hohfeld, *Fundamental Legal Conceptions* (1913) 23 YALE LAW JOURNAL, 16, 22.

[20] Holmes, *The Common Law* (1881) 7, 24-26.

[21] *Supra* note 2.

[22] But see Okla. Sess. Laws, 1910-11, ch. 70, secs. 4, 5. And note the use of the term *possession* in the language of the court in *Arner v. State, supra* note 1.

[23] *Sommer v. Cate* (1867) 22 Iowa, 585; *Pine v. Commonwealth* (1917) 121 Va. 812, 93 S. E. 652; (1921) 19 MICH. L. REV. 660. See also *Edwards v. American Express Co.* (1903) 121 Iowa, 744, 96 N. W. 74 (possession of gambling machine must be with intent to *use* for gambling, to make it illegal); but *contra, Stanley Liquor Co. v. People* (1917) 63 Colo. 456, 168 Pac. 750 (mere possession illegal).

[24] "No person shall . . . . possess any intoxicating liquor except as authorized in this Act." See *supra* note 2.

unlawfully acquired that is made a crime.[25] Is it not just as reasonable, then, to say that here, too, it is the violation of the law that makes the possession illegal? In the case of the state liquor statutes, it is the future intent,—the contemplated violation of the law—that makes the possession illegal; in the case of the National Prohibition Act it is the past intent—the executed violation of the law. The reason and the remedy are the same in both cases. Shall the result be different because in the one case the legislative declaration is that "there shall be no property rights of any kind whatsoever in liquor" intended to be *sold* in violation of the law, and in the other it is that there shall be no legal possession of liquor *bought* in violation of the law?

Even if there is a real difference between the two prohibitions, it is significant to note that in 1809 it was agreed that such a distinction could make no difference in a conviction for larceny.[26] "For where game was taken larceniously from the person of a party unqualified, and who by sundry statutes was forbidden not only to kill game, but even to have it in his *possession*, the possession was nevertheless held sufficient for the purposes of an indictment for larceny."[27]

This, of course, just as plainly begs the question as do the previous cases. It seems to point out conclusively, however, that the underlying ground for conviction, in all cases of this type, is public policy. There seems no escape from the conclusion that no matter how the owner's rights of property and possession are diminished, there will always be "possession . . . . sufficient for the purposes of an indictment for larceny."[28] Does it make any difference, then, whether courts rely upon a vestigial remainder of property, or whether we insist that, admitting the non-existence of property rights, they declare that public policy requires the punishment of one who has so plain an intent to be a thief? The former is more usual, the latter, perhaps better analytically, but in either case the courts reach the desired result—the merited punishment of a dangerous member of society.

Since this comment went to press, the case of *People v. Spencer* (1921, Calif. App.) 201 Pac. 130, has held that intoxicating liquors could not be the subject of larceny, on the ground that the Volstead Act declared that "no property right shall exist in any such liquor." The court reversed the usual method of attack. It came to an eminently logical conclusion on the question of property rights—based on however unsatisfactory a premise[1]—but, rather unfortunately, does not discuss at all the policy of giving the defendant the benefit of the distinction. Does this decision, alone in its field, mark a new departure?

[25] ". . . . the burden of proof shall be upon the possessor . . . . to prove that such liquor was lawfully acquired . . . ." Volstead Act, ch. 2, *supra* note 2.

[26] *Jones' Case*, reported in 3 Burns, *op. cit.* tit. *Larceny*, 241.

[27] *Ibid.* A modern case also seems to look forward to this question in its discussion of larceny as a crime even against possession illegal in itself. *Ellis v. Commonwealth* (1920) 186 Ky. 494, 217 S. W. 368.

[28] *Jones' Case, supra* note 26.

[1] See *supra* p. 307, notes 14, 15.